

CWA Section 401 Water Quality Certification

Section 404 Training
Philadelphia PA– June 2015

1

401 Certification: Overview

- Clean Water Act (CWA) §401 says:
 - No federal permit or license can be issued that may result in a discharge to waters of the United States
 - Unless
 - The state or authorized tribe certifies that the discharge is consistent with standards and other water quality goals, or waives
- No 401 cert or waiver means no federal permit or license

2

Who Has 401 Cert Authority?

- All states (and territories) where the discharge originates have 401 cert authority
 - Direct grant from CWA, not from EPA
- Indian tribes authorized to administer the WQS program can receive 401 cert authority if they request
 - No separate application needed
 - Need to identify tribal organization that will administer the 401 cert
 - EPA Regional office certs on behalf of tribes not yet authorized

What Actions Trigger 401 Cert?

- ❑ CWA permits
 - §402 NPDES permits
 - §404 dredge/fill permits
- ❑ Other Federal Permits and Licenses
 - Rivers and Harbors Act
 - Federal Power Act
 - ❑ Applicability of 401 to FPA licenses unanimously confirmed by Supreme Court in 2006 (*SD Warren*)
 - Atomic Energy Act
 - Taylor Grazing Act, Endangered Species Act – not currently
- ❑ Look for federal permit / license authorizing discharge into waters of the US

4

Basic 401 Certification Process

- ❑ Applicant applies to state or tribe for cert
- ❑ State or tribe reviews
 - Public notice required
 - Public hearing possible
- ❑ State or tribe issues certification decision
- ❑ Federal permit / licensing agency issues final decision

5

Recommendation: Early Coordination

- ❑ Check with EPA / other Federal agencies for applicability of 401 cert
 - Is a "water of the US" involved?
 - What is the permitting/licensing agency's timeframe?
- ❑ Project proponents should contact the state and understand what information is necessary to apply for 401 cert
- ❑ Talking early and often helps avoid costly surprises

6

Evaluating a 401 Cert Request

- ❑ States / tribes should consider
 - All potential water quality impacts,
 - both direct and indirect,
 - For the life of the project
- ❑ Decision can be based on:
 - Data from applicant
 - Any other available and reliable data

7

What Must Be Determined?

- ❑ Before issuing a cert, the state/tribal should conclude that the permitted or licensed activity will be consistent with:
 - Effluent limitations (CWA §301 & 302)
 - Water quality standards and implementation plans (CWA §303)
 - National standards of performance (CWA §306)
 - Toxic and pretreatment effluent standards (CWA §307)
- PLUS
- Any other appropriate state/tribal requirements

8

What Can a State/Tribe Do Under 401 Cert?

- ❑ **Grant:** indicates activity consistent with standards and other provisions
- ❑ Effect of granting:
 - federal agency can proceed and evaluate whether a permit / license should be issued, and with what conditions

9

What Can a State/Tribe Do Under 401 Cert?

- **Grant With Conditions:** indicates activity consistent only if listed conditions are met
 - Scope of potential conditions can be quite broad
- Effect of granting with conditions:
 - Every 401 condition must become a term of the permit or license, if issued. Federal agency can't pick and choose.
 - If applicant dislikes conditions, needs to take issue to "appropriate forum of state law" – federal agency has little control over the conditions.

10

What Can a State/Tribe Do Under 401 Cert?

- **Deny:** indicates activity is not consistent with water quality standards and other goals
 - Implication is that no conditions would be adequate to ensure goals met if permit / license issued
- Effect of denying:
 - Federal agency can't issue permit or license

11

What Can a State/Tribe Do Under 401 Cert?

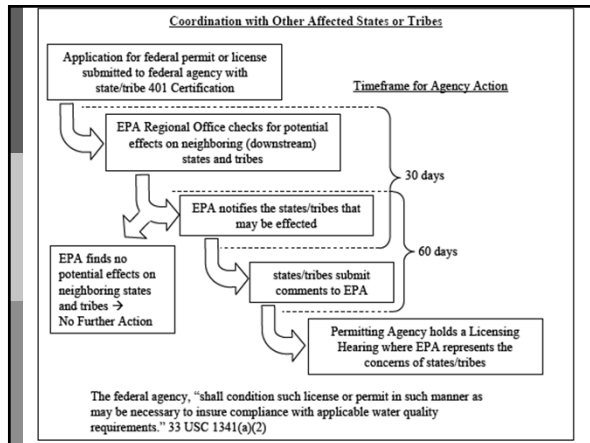
- **Waive:** state/tribal agency decides to not act on 401 application request
 - Waiver can be by passage of time, or explicit
 - CWA provides "any reasonable period not to exceed one year"
 - Watch out for federal permit/license agencies with shorter timeframes
- Effect of waiving: 401 cert not required for federal agency to issue permit/license

12

Recommendation

Never waive by accident

13



Reviewing the Players

- Project proponent / applicant
- Federal permitting or licensing agency
- Agency with 401 cert authority
 - State / tribe where discharge originates
 - EPA regional office, if tribe not authorized
- Neighboring states or tribes

15

State/Tribal 401 Cert Regulations

- ❑ Not required by EPA, just recommended
- ❑ Ideally would include
 - Application process and review
 - Timeframes
 - Content of complete application
 - Fees
 - Decision basis
 - Monitoring and enforcement
 - Mitigation

16

401 Certification Regulations

- ❑ **Application process and review**
 - Procedural and substantive
 - Goals:
 - ❑ A defensible decision
 - ❑ Resource requirements minimized
- ❑ **Timeframes**
 - Harmonize with federal agency timeframes – not always one year
 - Clock starts with a complete application
 - ❑ Regs should clarify what is a complete application

17

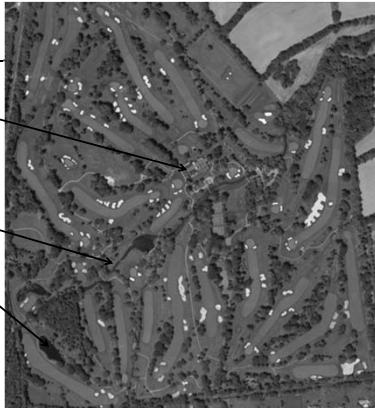
401 Certification Regulations

- ❑ **Application Fees**
 - Allowed under the CWA
 - ❑ **Basis for Decisionmaking**
 - Describe basis for decision
 - Specify who is responsible for demonstrating compliance with water quality provisions
 - Identify types and sources of information potentially considered
- Goal: a defensible well-documented decision

18

Example: Golf Course

- ❑ Stormwater runoff controls
- ❑ Biological control of weeds and pests
- ❑ Vegetated buffer areas
- ❑ Fish stocking
- ❑ Best management plans



Hydropower

- ❑ Wetlands destroyed or damaged
- ❑ Loss of habitat
- ❑ Threatened or endangered species impacted
- ❑ Specific water quality standards violations likely
- ❑ Applicant underestimated area impacted



401 Certification: Review

- ❑ Clean Water Act (CWA) §401 says:
 - No federal permit or license can be issued that may result in a discharge to waters of the United StatesUnless
 - The state or authorized tribe certifies that the discharge is consistent with standards and other water quality goals, or waives
- ❑ No 401 cert or waiver means no federal permit or license

Resources

Interim Handbook:
http://water.epa.gov/lawsregs/guidance/cwa/waterquality_index.cfm

State and Tribal 401
Certification Program
Support through the
Association of State
Wetlands Managers:
<http://aswm.org/>

